Filed 12/10/08 P. v. Chavez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAMIRO ARAIZA CHAVEZ, Defendant and Appellant.	B194476 (Los Angeles County Super. Ct. No. BA276962-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ramiro Araiza Chavez of inflicting corporal injury on a cohabitant, committing assault likely to cause great bodily injury, and making criminal threats. The victim, who testified at trial, was Chavez's girlfriend and the mother of his young child. Chavez appeals, claiming due process violations and ineffective assistance of counsel. He also argues that he should have been granted a new trial because his girlfriend recanted her trial testimony. We affirm.

FACTS

At trial, Chavez's girlfriend, Mary Lou Diaz, testified that after Chavez was released from prison in July 2004, he moved in with Diaz and their seven-month-old daughter Myra, who lived with Diaz's mother. Diaz asked him to leave after Chavez, who had been drinking, almost dropped the baby, and Chavez left and moved in with his mother. After Chavez apologized, Diaz and her daughter moved in with Chavez at his mother's home.

On January 8, 2005, Chavez, Diaz and Myra went to Diaz's parents' home to prepare for Myra's first birthday party. While Chavez drove their van back to Chavez's mother's house, Chavez and Diaz began to argue about Chavez's drug use, and as they drove down the street Chavez struck Diaz on her mouth with the back of his fist, splitting open her lower lip and breaking her front tooth in half. Diaz, crying, got out of the moving van. Chavez stopped the van, got out, grabbed Diaz by the arm and ordered her back into the van "before I really kick your ass." Afraid for her daughter in the back seat, Diaz got back into the van and Chavez, still yelling, drove around to cool off.

Chavez drove back to his mother's house. Diaz called her mother and told her to come get her, and entered the house to pack her things. While she was packing, Chavez told her "I don't give a fuck. Call the fucking cops on me. Send me to prison. It's just a walk in the park. I'll be out," and told her to watch and see what would happen then. Diaz was scared. After she packed her and Myra's bags, she was in the hallway reaching for the keys when Chavez approached her, put his hands around her neck, and choked her. Diaz coughed, could not breathe, became dizzy, and began to lose consciousness.

Chavez's mother came out of her bedroom, saw what was happening, and went back in and closed the door. Chavez let go of Diaz's neck only when his two little nieces ran down the hallway.

Diaz's parents arrived and picked up Diaz and her daughter and most of their things. The next day, Diaz went to the police station and reported the beating and the threats.

Following the January 2005 incident, Diaz attended domestic violence classes and learned "it's not OK to be with a man who hits you for no reason," the way that Chavez would hit her when she didn't "have things done right for him." She realized he would not change. After she was subpoenaed to testify at Chavez's trial, a car full of his friends pulled up at her house, where she was standing with her daughter. They got out of the car, waved a gun, and said that they would kill her if she went to court: "You're a rat. . . . You can't do that" to their "homeboy." She called the police and filed a report. On the Saturday before trial, while she and Myra were inside, someone fired a shot at the house. Diaz was admitted into the witness protection program. Although she was afraid, she decided to testify.

Deputy Armando Morales of the Los Angeles County Sheriff's Department testified that he interviewed Diaz on January 10, 2005, the day after she reported the beating and threats. She gave Morales the same story as above. Diaz said she was frightened of Chavez, who was a violent gang member and owned guns.

Deputy Morales had also contacted Diaz after a similar instance of violence in August 2003, when she was three months pregnant with Chavez's daughter Myra. Diaz had not given him details then. Two years later, at the January 2005 interview, she was willing to describe the 2003 incident. Diaz was walking home from a "quinceanera" when Chavez, who was armed, drove up beside her and ordered, "Get in the fucking car, you fucking bitch." When she obeyed, he punched her in the mouth with his fist. She opened the passenger door, and he sped up and pushed her out, and she landed on the pavement on her stomach and skinned her knees. Passersby called the police while Chavez tried to get Diaz to get back into the car. An ambulance took her to the hospital

to check her pregnancy, but Diaz, who was afraid, said only that her boyfriend had done it. In 2003, Diaz did not want to prosecute because Chavez had guns and she was afraid of him and his friends.

Chavez's mother testified that Diaz was "ill-mannered" and denied that she saw Chavez choke Diaz. Chavez's sister testified that she did not like Diaz but admitted that Chavez had been violent toward her and toward Diaz.

Chavez testified that he had never been violent with Diaz. He admitted that they had argued in 2005, but denied that he hit or choked her in 2005 or pushed her out of the car in 2003. When asked about her injuries as documented by the hospital, he suggested she might have injured herself. He also denied any drug use, although he admitted to having been a member of the gang "Stoner 13." He admitted past convictions for robbery and felon in possession of a firearm, and claimed while he "grew out" of his gang he could not formally get out.

The jury convicted Chavez on all three counts: inflicting corporal injury on a cohabitant (Pen. Code, § 273.5 subd. (a)), committing assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)), and making criminal threats (Pen. Code, § 422). The information alleged a prior serious-felony conviction and a prior felony-strike conviction, both for robbery, and two prior prison terms. The trial court denied jury trial on the priors and found the priors true. After denying Chavez's motion for a new trial, the trial court sentenced him to state prison for 15 years.

DISCUSSION

I. The trial court's admission of evidence of prior acts of domestic violence and its instruction to the jury did not violate due process or equal protection

A. Constitutionality of Evidence Code section 1109

The trial court admitted the evidence of Chavez's prior acts of domestic violence under Evidence Code section 1109, subdivision (a)(1), which provides "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made

inadmissible by [s]ection 1101 if the evidence is not inadmissible pursuant to [s]ection 352." Chavez's counsel objected, and the trial court overruled the objection.

On appeal, Chavez argues that Evidence Code section 1109 violates due process because it allowed the jury to infer his guilt based on prior acts, therefore making his trial fundamentally unfair. In *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court considered a due process challenge to Evidence Code section 1108, a parallel statute to section 1109, which allows admission of the defendant's other sex crimes to show a propensity to commit such crimes. In section 1108, the Legislature relaxed the restriction on propensity evidence "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. . . . [¶] 'The Legislature has determined the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.'" (*Id.* at p. 911). Under section 1108, propensity evidence was no longer unduly prejudicial per se. (*Ibid.*) The Supreme Court concluded that section 1108 did not violate due process, because Evidence Code section 352[1] allowed the trial court, in its discretion, to exclude such evidence if its probative value was outweighed by the probability that it would "'create a substantial danger of undue prejudice, or confusion of issues, or misleading the jury.'" (*Ibid.* at p. 917.)

We agree with the many appellate courts that have applied *Falsetta* and concluded that section 1109, like section 1108, does not violate due process. "A careful weighing of prejudice against probative value under [section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) Because "[a]dmission of evidence of prior acts of domestic violence under section 1109 is similarly subject to the limitations of section 352[, u]nder

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[1] Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

the reasoning of *Falsetta*, this safeguard should ensure that section 1109 does not violate the due process clause." (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095; see also *People v. Cabrera* (2007) 152 Cal.App.4th 695, 704; *People v. Price* (2004), 120 Cal.App.4th 224, 240; *People v. Jennings, supra*, 81 Cal.App.4th at pp. 1312-1314; *People v. James* (2000) 81 Cal.App.4th 1343, 1353; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420.) We reject Chavez's due process challenge to Penal Code section 1109.

Chavez also argues that section 1109 violates equal protection because, by sanctioning the admission of propensity evidence (which is traditionally excluded), it singles out domestic violence offenders for special treatment without a rational basis. In *People v. Jennings, supra*, 81 Cal.App.4th 1301, the First District rejected a similar claim. The court noted that, "Neither the federal nor the state constitution bars a [L]egislature from distinguishing among criminal offenses in establishing rules for the admission of evidence; nor does equal protection require that acts or things which are different in fact be treated in law as though they were the same. . . . [¶] Appellant fails to show that domestic violence defendants are 'similarly situated' with respect to all other criminal defendants." (*Id.* at p. 1311.) Because section 1109 does not violate due process, "the statute will satisfy constitutional equal protection requirements if it simply bears a rational relationship to a legitimate state purpose." (*Id.* at p. 1312.)

Chavez argues that there is no rational basis to distinguish between domestic violence offenders and other offenders such as robbers and burglars. We disagree. As the court stated in *People v. Jennings, supra*, 81 Cal.App.4th 1301, "The special relationship between victim and perpetrator in both domestic violence and sexual abuse cases, with their unusually private and intimate context, easily distinguish these offenses from the broad variety of criminal conduct in general. . . . The Legislature could rationally distinguish between these . . . cases and all other criminal offenses in permitting the admissibility of previous like offenses in order to assist in more realistically adjudging the unavoidable credibility contest between accuser and accused."

(*Id.* at p. 1313 [citing *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-85] ; see *People v. Price*, *supra*, 120 Cal.App.4th at pp. 240-241; *People v. Falsetta*, *supra*, 21 Cal.4th at p. 915 [describing similar credibility issues present in sex offense trials].) We reject Chavez's equal protection challenge.

B. Constitutionality of jury instructions

During Deputy Morales's testimony about the 2003 incident in which Chavez pushed a pregnant Diaz out of the moving van, the trial judge told the jury that it could infer from evidence of previous incidents of alleged domestic violence that "defendant had a disposition to commit an offense involving domestic violence," and that the jury "may, but [is] not required to, infer that he was likely to commit and did commit the crime or crimes with which he was charged. However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that the defendant committed the charged offenses." The judge cautioned that any inference from the prior acts "is simply one item for you to consider along with all the other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime or crimes." At the close of evidence, the court gave the jury substantially the same instruction, CALJIC No. 2.50.02.[2] The trial court again overruled

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[2] CALJIC No. 2.50.02, as given, provides in part:

"Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence other than that charged in the case. [¶] . . . [¶] If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit an offense involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes with which he is accused.

"However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all the other evidence presented in this case in

Chavez's objection. The court also instructed the jury with CALJIC No. 2.50.1, which provides in part, "If you find by a preponderance of the evidence that the other crime or crimes were committed by the defendant, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime."[3]

On appeal, Chavez argues that the court's instructions violated due process because they allowed the jury to convict him by a preponderance of the evidence, thus violating the constitutional requirement that the prosecution prove him guilty beyond a reasonable doubt. He relies on *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812. The Ninth Circuit held that the 1998 version of CALJIC No. 2.50.01 (which applies to evidence of prior sexual offenses, and mirrors No. 2.50.02, the domestic violence instruction given in this case) given in conjunction with the 1998 version of CALJIC No. 2.50.1, was unconstitutional. The federal court of appeals concluded that the two instructions permitted the jury to find that the defendant committed the earlier sexual offenses by a preponderance of the evidence, and then to infer that he had committed the instant

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determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime or crimes.

"You must not consider this evidence for any other purpose."

[3] As given, CALJIC No. 2.50.1 states in its entirety:

"Within the meaning of the preceding instruction [CALJIC No. 2.50.02], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed a crime or crimes other than those for which he is on trial.

"You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other crime or crimes.

"If you find by a preponderance of the evidence that the other crime or crimes were committed by the defendant, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime."

offense, thus diluting the due process principle that guilt must be established beyond a reasonable doubt. (*Id.* at p. 822; see *Taylor v. Kentucky* (1978) 436 U.S. 478, 485-486.)

CALJIC No. 2.50.01, as given to Gibson's jury, told the jurors that they could infer from the evidence of prior sex offenses that Gibson had a disposition to commit the charged offense, and that he thus was likely to and did commit the charged crime. While that instruction alone did not violate due process, the jury was also instructed in the prior version of CALJIC No. 2.50.1 that the prosecution had the burden to prove the prior offenses by a preponderance of the evidence. Neither instruction explained that the jury still had to find the defendant guilty of the instant offense beyond a reasonable doubt; as a result, "the burden of proof the instructions supplied for the permissive inference [of defendant's guilt of the charged crime] was unconstitutional." (*Gibson v. Ortiz, supra*, 387 F.3d at p. 822; see *People v. Frazier* (2001) 89 Cal.App.4th 30, 37.)

For the purpose of constitutional analysis, there is no material difference between CALJIC No. 2.50.01, the sex offense instruction found unconstitutional in *Gibson*, and CALJIC No. 2.50.02, the domestic violence instruction given to Chavez's jury. (*People v. Wilson* (2008) 166 Cal.App.4th 1034, 1049.) But the jury in this case received CALJIC No. 2.50.02 as amended in 1999 and again in 2002, to address the due process violation the federal appeals court identified in *Gibson.* The amended CALJIC No. 2.50.02 as given in Chavez's trial states that if the jury finds by a preponderance of the evidence that the defendant committed a prior crime or crimes of domestic violence, "that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. . . . [Any] inference [drawn from this evidence] is simply one item for you to consider along with all the other evidence presented in this case in determining whether the defendant has been proved guilty *beyond a reasonable doubt* of the charged crime or crimes." (Italics added.) The California Supreme Court has found the 1999 version of 2.50.01 constitutional, because it properly explained that the prosecution retained the burden of proving the charged crime beyond a reasonable doubt. (*People v. Reliford* (2003) 29 Cal. 4th 1007, 1016 [noting that the 2002 version "provides additional guidance on the permissible use of the other-acts evidence and reminds the jury of the

standard of proof for a conviction of the charged offenses"].) Similarly, the amended CALJIC No. 2.50.02, as given in this case, passes constitutional muster.

The trial court also instructed the jury with the amended CALJIC No. 2.50.1, which states, "If you find by a preponderance of the evidence that the other crime or crimes were committed by the defendant, you are nevertheless cautioned and reminded that *before a defendant can be found guilty of any crime charged in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime*." (Italics added.) The California Supreme Court recently has held that the amended CALJIC No. 2.50.1, given in tandem with the amended CALJIC No. 2.50.01, presented "no reasonable likelihood that the instructions as a whole led the jury to believe that the prosecution was not required to prove all elements of [the charged offense] beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 34-36 [*Gibson* is "inapposite" to cases involving the amended instructions].)

The giving of the amended instructions, CALJIC Nos. 2.50.02 and 2.50.1, did not violate his right to due process and equal protection.

II. Chavez did not receive ineffective assistance of counsel

Chavez claims he received ineffective assistance of counsel. He argues that the case against him was "weak" and "depended almost entirely on the credibility of the complaining witness" (Diaz), and his attorney's mistakes resulted in prejudice.

"'"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to

provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]"'" (*People v. Salcido* (2008) 44 Cal.4th 93, 170, quoting *People v. Lopez* (2008) 42 Cal.4th 960, 966.)

Chavez identifies 11 instances in which his attorney failed to object to evidence elicited by the prosecution or pursued improper lines of questioning. The record shows, however, that his attorney did object to Diaz's testimony that Chavez used methamphetamine, that he owned guns, and that Chavez was a gang member. In addition, counsel did object to Diaz's testimony about Chavez sending his armed friends to threaten Diaz, and the court sustained the objection. Counsel also objected to evidence of other threats made by Chavez. When the trial court later found the evidence of threats admissible, it stated it would give the required limiting instruction.

More centrally, trial counsel did object to the evidence of prior domestic violence admitted under Evidence Code section 1109, and on cross-examination, attacked Diaz's credibility by questioning why she did not report it and why she did not leave.

Chavez's remaining complaints include counsel's failure to object to testimony that Diaz was pregnant in 2003 when he pushed her from the moving vehicle and onto the sidewalk. Chavez argues that this evidence was inflammatory and irrelevant. But Diaz's pregnant state was relevant to whether Diaz jumped from the car or Chavez pushed her, because her pregnancy would make her less likely to jump.

Chavez also points to his counsel's failure to object to testimony that he carried guns, that Diaz had a restraining order against him, and that Diaz knew Chavez's father also had a restraining order against him. All this testimony, however, is highly relevant to show that Diaz had reason to fear and did fear Chavez, taking his threats seriously. Chavez argues that his counsel should not have elicited evidence that he carried a handgun for protection, but this can be explained as an attempt to show that (as prior testimony indicated) Chavez's gun ownership was motivated by self-defense.

The prosecution argues that the defense strategy was to attack Diaz's credibility and trustworthiness, and that the failure to object to these items resulted from a calculated decision to portray Diaz as a wild exaggerator and Chavez as a loving father. We agree that it is reasonable to conclude that these evidentiary decisions were tactical. "'[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions,' claims of ineffective assistance of counsel generally must be raised in a petition for habeas corpus based on matters outside the record on appeal. [Citations.] The rule is particularly apt when the asserted deficiency arises from defense counsel's failure to object. 'Deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' [Citations.] Here, the record establishes that defense counsel had valid tactical reasons for not objecting . . . ." (*People v. Salcido, supra,* 44 Cal.4th at p. 172.) When the record on appeal "'"sheds no light on why counsel acted or failed to act in the matter challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Chavez claims his counsel took other actions which "were not necessarily prejudicial" but which showed a lack of preparation. But Chavez must show that these actions prejudiced his case. Because he admits that he cannot show that they were prejudicial, these actions cannot form the basis for a claim of ineffective assistance of counsel.

We conclude Chavez has not shown that his trial counsel's performance was outside the wide range of professional competence.

III. The trial court did not abuse its discretion in admitting evidence that Diaz had been threatened not to testify

Chavez claims that the trial court should not have admitted Diaz's testimony that she had been threatened in order to intimidate her not to testify. He argues that the

admission of that testimony violated Evidence Code section 352, because its prejudicial effect outweighed its probative value.

As long as the testimony is "strictly limited to establishing the witness's state of mind," testimony that a witness is testifying after threats or under fear of recrimination is "highly relevant." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) "For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim. . . . [¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear." (*Id.* at p. 1369.)

The trial court gave a limiting instruction to the jury, cautioning them that there was no evidence whatsoever that Chavez was responsible for the threats about which Diaz testified, and admonishing that they were "to consider the evidence only to the extent that it affords you some insight into the witness's candor, her credibility." This correctly limited the evidence to Diaz's credibility. (*People* v. *Olguin*, *supra*, 31 Cal.App.4th at p. 1368.)

The trial court acted within its discretion in admitting Diaz's testimony about the threats, and appropriately ensured that the jury would properly evaluate the evidence.

IV. The trial court did not abuse its discretion in denying Chavez's new trial motion

After his conviction on August 25, 2005, Chavez filed a motion for a new trial on March 15, 2006. The motion stated that Chavez and Diaz had married on October 9, 2005, and attached a handwritten letter from Diaz to Chavez dated August 30, 2005. In the letter, Diaz stated, "I lied to the court, DA and to the cops" because "I couldn't take it when he [Chavez] lefted [*sic*] me and found me with someone els [*sic*]." She continued, "I made up a false report so he would go to jail. And be all alone and feel sad like me. I

did something very wrong and I'm very sorry know [*sic*] words can explan [*sic*] how I feel." She stated, "he never hit me, choked me and he never threaten [*sic*] me." The letter is signed in the margin. The court heard argument on April 3, 2006 and denied the new trial motion the same day.

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.] '"[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) Diaz's post-trial recantation of her testimony is new evidence. While "'a motion for a new trial should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant,'" a witness's recantation must be weighed against the "probative value of her earlier testimony regarding defendant's guilt" and any other testimony against the defendant. (*Id.* at p. 329.) Generally, "the recantation of a witness should be given little credence." (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481.)

At the hearing on the motion, the trial court noted that the jury had found Diaz's trial testimony credible. The trial court stated that the recantation was "right in line with the sort of situation that is oftentimes encountered in these sorts of circumstances . . . . [A] female victim does everything in her power to absolve the abuser and to see that he is not punished, that he's not penalized in response to his actions." The court summarized Diaz's trial testimony and the physical evidence, and described Diaz as "a particularly credible witness." She did not explain away her physical injuries in her letter, and "I recall her testifying. I see her as she was sitting on the stand, maybe five feet away from me, and it never struck me during the course of her testimony that there was anything retributive in the way that she was testifying." The court concluded "as a matter of law, simply because a victim states that 'I didn't testify truthfully,' barring any other circumstances, that is insufficient . . . in and of itself to overturn, as you know. There has to be some additional substance to this, and I just find it lacking."

In light of the careful review of Diaz's testimony at trial, the understanding of "her obvious continued attachment to defendant" (*People v. Delgado, supra*, 5 Cal.4th at p. 329) and the contradictions between the recantation and other evidence submitted at trial, the trial court's denial of the motion for a new trial was well within its discretion.

DISPOSITION

We affirm Chavez's conviction and the denial of his motion for a new trial.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.